

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
ROOM 211
FEDERAL BUILDING AND U.S. POST OFFICE
225 SOUTH PIERRE STREET
PIERRE, SOUTH DAKOTA 57501-2463

IRVIN N. HOYT
BANKRUPTCY JUDGE

TELEPHONE (605) 224-0560
FAX (605) 224-9020

August 22, 2005

Laura L. Kulm Ask, Esq.
Counsel for Debtor
Post Office Box 966
Sioux Falls, South Dakota 57101

Jason W. Shanks, Esq.
Counsel for Fin-Ag, Inc.
Post Office Box 88738
Sioux Falls, South Dakota

Jonathan K. Van Patten, Esq.
Counsel for Fin-Ag, Inc.
Post Office Box 471
Vermillion, South Dakota 57069

Subject: *In re Berwald Partnership,*
Chapter 11, Bankr. No. 04-10273

Dear Counsel:

The matter before the Court is the Application for Compensation and/or Reimbursement for Costs, Expenses, and Attorney's Fees filed by Fin-Ag, Inc., the objection to the Application filed by Debtor, and Fin-Ag, Inc.'s subsequent request that its Application be deemed timely filed. This is a core proceeding under 28 U.S.C. § 157(b)(2). This letter decision and accompanying Order shall constitute the Court's interim decision regarding the timeliness of Fin-Ag, Inc.'s Application.

Summary. On May 31, 2005, Debtor filed an objection to Fin-Ag's proof of claim.¹ In part, Debtor objected to the

¹ The mailing list of creditor's prepared by Debtor identified this creditor as CHS Fin-Ag, and the docketing system

reasonableness of the attorneys' fees and expenses that Fin-Ag had included in its claim:

8) This claim also includes unreasonable amounts in attorney's fees. This creditor's attorneys have sent detailed itemizations showing a total in fees and costs of \$45,598.85. In addition, this creditor has submitted a billing itemization showing a total of \$52,860.49 in legal fees that have been added to this claim.

9) In addition, this claims [sic] includes amounts billed for representatives that are not attorneys. Only certified paralegals can be billed out in bankruptcy matters. All other charges have not been determined to be reasonable to add them to this claim.

10) Furthermore, this creditor's claim includes attorney's fees of which Debtor did not approve to be included in this claim and of which the creditor did not file an application under Rule 2016(a), to be compensated for by Debtor. In accordance with Bankruptcy Rule 2016(a) any entity seeking final compensation for services or reimbursement of necessary expenses, from the estate, shall file an application for such. The time period for said filing has expired and this creditor has failed to file an application in accordance with the bankruptcy rules. Therefore, the amount listed in this claim for attorney's fees should be disallowed totally.

11) This creditor's claim includes reimbursement for what it claims as necessary expenses, of which Debtor did not approve to be included in this claim and of which the creditor did not file an application for

carried over that name when the creditor's proof of claim was filed. The proof of claim, however, lists the creditor's name as Fin-Ag, Inc. That is also the name used by the creditor in its pleadings.

under Bankruptcy Rule 2016(a), to be compensated for by Debtor. Therefore, the amount listed in this claim for reimbursement of expenses should be disallowed totally.

On July 5, 2005, Fin-Ag responded by filing an Application for Compensation and/or Reimbursement for Costs, Expenses, and Attorney's Fees ("Application"), which included an itemization of the services rendered and expenses incurred by their attorneys, Jason W. Shanks and Jonathan K. Van Patten, and an investigator, Jerry Derr.

While the Application was pending, the first hearing on Debtor's objection to Fin-Ag's proof of claim was held. The hearing was continued to August 23, 2005, to allow a possible settlement.

On August 1, 2005, Debtor filed an objection to the Application. Debtor again argued that Fin-Ag was required to file an application for fees under Fed.R.Bankr.P. 2016. It further argued that the deadline for filing an administrative expense in this case was May 18, 2005, and that Fin-Ag had missed that deadline. Debtor also again argued that the fees requested in the Application were not reasonable.

In apparent response to Debtor's argument that its Application was not timely, on August 12, 2005, Fin-Ag filed a Motion for Enlargement of Time to File Fin-Ag's Application for Compensation and/or Reimbursement for Costs, Expenses, and Attorney's Fees. Therein, Fin-Ag asked that its Application be considered regardless of timeliness.

Applicable law. Section 506(b) of the Bankruptcy Code allows fully secured creditors to recover certain post-petition costs, including reasonable attorneys' fees and costs. *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 240 (1989). To recover these fees and costs, the creditor has the burden to establish that: (1) it is over secured in excess of the fees requested; (2) the parties' agreement provides for the fees; and (3) the fees requested are reasonable. *First Western Bank &*

Trust v. Drewes (In re Schriock Construction, Inc.), 104 F.3d 200, 201 (8th Cir. 1997)(citing *In re Foertsch*, 167 B.R. 555, 562 (Bankr. D.N.D. 1994)(cites therein omitted))(cited in *McGehee v. Cox (In re Griffin)*, 310 B.R. 610, 617 (B.A.P. 8th Cir. 2004); *In re Cushard*, 235 B.R. 902, 906 (Bankr. W.D. Mo. 1999)(creditor bears burden of proving reasonableness of fees sought under § 506(b)); *In re Kroh Bros. Development Co.*, 105 B.R. 515, 520 (Bankr. W.D. Mo. 1989)(creditor bears burden of proving reasonableness of the request).

The "touchstone" for determining the reasonableness of the fees is what the creditor would have spent if the creditor were paying rather than passing the fees and costs onto the debtor. *In re Smoots*, 230 B.R. 140, 143-44 (Bankr. D. Minn. 1996). Thus, the Court must consider whether the actions taken by the creditor were reasonable and prudent under the circumstances and whether the itemized fees themselves are reasonable. *White v. Coors Distributing Co. (In re White)*, 260 B.R. 870, 880 (B.A.P. 8th Cir. 2001)(quoting therein *Cushard*, 235 B.R. at 906-07); *Kroh Bros.*, 105 B.R. at 521. Attorneys' fees incurred by a creditor are inherently unreasonable if they are "not cost-justifiable either by the economics of the situation or necessary in order to preserve the creditor's interest in light of the legal issues of the case." *Foertsch*, 167 B.R. at 562. Fees may be disallowed if the services rendered were not necessary or were the result of excessive caution or overzealous advocacy. *Kroh Bros.*, 105 B.R. at 521.

In light of the considerations discussed above, the court then applies the lodestar formula, *White*, 260 B.R. at 880, which is the number of hours reasonably expended by the attorney multiplied by a reasonable hourly rate. *P.A. Novelly v. Palans (In re Apex Oil Co.)*, 960 F.2d 728, 731.

Because this lodestar amount presumably reflects (1) the novelty and complexity of the issues, (2) the special skill and experience of counsel, (3) the quality of representation, and (4) the results obtained, these factors normally cannot serve as

independent bases for increasing the fee award above the lodestar amount. See, e.g., *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 565, 106 S.Ct. 3088, 3098, 92 L.Ed.2d 439 (1986)(*Delaware I*); *Blum v. Stenson*, 465 U.S. 886, 898-900, 104 S.Ct. 1541, 1548-1550, 79 L.Ed.2d 891 (1984). The Supreme Court, however, has stated that upward adjustments of the lodestar figure are permissible "in certain 'rare' and 'exceptional' cases, supported by both 'specific evidence' on the record and detailed findings by the lower courts." *Delaware I*, 478 U.S. at 565, 106 S.Ct. at 3098.

Apex Oil Co., 960 F.2d at 731-32. A reasonable hourly rate is considered to be the prevailing market rate in the community. *Forshee v. Waterloo Industries, Inc.*, 178 F.3d 527, 532 (8th Cir. 1999)(quoting therein *Blum v. Stenson*, 465 U.S. 886, 895 (1984)).

The reasonableness of a creditor's attorney's fees are determined as part of the claims process. *In re Alanis*, 316 B.R. 323, 325 (Bankr. W.D. Ark. 2004).

If the fees and expenses were based on the creditors' right to collect the fees under the respective pre-petition mortgages or deeds of trust, the right to payment would be part of a pre-petition claim, even though the fees and charges were not incurred until after the debtors filed their respective bankruptcy petitions.

Id. Moreover, the creditor is not required to get pre-approval of its post-petition charges or fees before including them in its proof of claim. *Id.* If the debtor does not like the fees included in the claim, then he can file an objection to the claim. *Id.*

Section 506(b) does not specifically require a creditor to file an application in the format governed by Rule 2016(b). *Atwood v. Chase Manhattan Mortgage Co. (In re Atwood)*, 293 B.R.

In re Berwald Partnership
August 22, 2005
Page 6

227, 231 (B.A.P. 9th Cir. 2003). The format, though, is useful, and Rule 2016(b) can be read broad enough to include a request for costs and fees that are being included in a creditor's proof of claim under § 506(b). *Id.* at 231-32.

Discussion. Fin-Ag is seeking payment of its "reasonable fees, costs, or charges" as part of its allowed secured claim under § 506(b), not as an administrative expense against the estate under 11 U.S.C. § 503(b). Accordingly, Fin-Ag's Application is timely; it was not governed by the May 18, 2005, deadline. Further, Fin-Ag's use of an Application, akin to one filed under Rule 2016(b), was appropriate because it gave Debtor the itemization and opportunity to review that it had requested.

Accordingly, to the extent that Debtor has objected to the timeliness of Fin-Ag's request for "reasonable fees, costs, or charges" through the Application, that objection is overruled. Fin-Ag's August 12, 2005, Motion for Enlargement of Time to File Fin-Ag's Application for Compensation and/or Reimbursement for Costs, Expenses, and Attorney's Fees is moreover deemed moot. An appropriate order will be entered.

The issues regarding the reasonableness of Fin-Ag's requested fees, costs, or charges under § 506(b) as raised by Debtor's objection to Fin-Ag's proof of claim and by Fin-Ag's Application will be discussed with counsel as scheduled on Tuesday, August 23, 2005. If an evidentiary hearing is needed, the date, time, and place for that hearing will be set during Tuesday's telephonic hearing.

Sincerely,

A handwritten signature in dark ink, appearing to read "Irvin N. Hoyt", written in a cursive style.

Irvin N. Hoyt
Bankruptcy Judge

INH:sh

CC: case file (docket original; serve parties in interest)